No. 05 47 JUL 5 - 2005

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In the Supreme Court of the United States

DENNIS K. MCFADDEN,

Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, DOMINGUEZ STATE JAIL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the Fifth Circuit Court of Appeals erred in affirming the District court granting judgment as a matter of law against McFadden when he proffered legally sufficient evidence to support the jury's finding that TDCJ had intentionally discriminated against him.

PARTIES TO THE PROCEEDING

The Petitioner is Dennis K. McFadden, an individual.

The Respondent is the Texas Department of Criminal Justice.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Dennis K. McFadden ("McFadden"), respectfully petitions for a writ of certiorari to review the decision entered in this case by the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit").

OPINIONS BELOW

The opinion of the Fifth Circuit was a *per curiam* opinion and is reprinted in the Appendix ("App.") to this petition at App. A, 1a - 7a. The Judgment entered by the United States District Court for the Western District of Texas (the "District Court") from which the Fifth Circuit appeal was taken was unreported and reprinted at App. D, 12a - 22a.

STATEMENT OF JURISDICTION

On April 4, 2005, the Fifth Circuit entered the Opinion from which review is sought. (See App. A, 1a - 7a). McFadden invokes the jurisdiction of this court pursuant to 28 U.S.C. § 1254 and seeks the issuance of the writ of certiorari pursuant to Supreme Court Rule 10. By holding that McFadden failed to produce legally or factually sufficient evidence, the Fifth Circuit deviated from the Supreme Court's standard for evaluating the sufficiency of evidence as articulated in Reeves. The Fifth Circuit's decision calls for an exercise of this Court's supervisory powers.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the District Court.

On April 5, 2002, McFadden instituted this action against the TDCJ in the United States District Court for the Western District of Texas. McFadden stated a claim for race discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., and the Texas Labor Code §451.001.

On October 29, 2003, finding that McFadden's arguments raised genuine issues of material fact as to the reasons for his termination, the District Court denied TDCJ's pretrial motion for summary judgment. The case proceeded to trial.

The parties presented evidence to the jury between November 3, and November 6, 2003. On November 6, 2003, the jury, after listening to testimony from 9 live witnesses and reviewing 65 total admitted exhibits, returned a verdict in favor of McFadden awarding him $75,000.00 in back pay and $200,000.00 in mental anguish.

The district court subsequently granted TDCJ's motion on March 24, 2004, concluding that the jury's finding of race-based discrimination was against the great weight of evidence. On July 2, 2004, McFadden timely filed a Notice of Appeal as to the District Court's dismissal of the jury verdict.

STATEMENT OF FACTS

McFadden is an African-American resident of San Antonio, Texas. He has been married to Vanessa McFadden since 1980 and has two daughters, Tasia and Keisha who

were 20 and 19, respectively, at the time of trial. McFadden is also a veteran of the United States Army who, after 3 years of admirable service to our country, received an honorable discharge in 1981.

After completing 400 hours of law enforcement training at Southwest Texas State University, McFadden became a peace officer of the state of Texas. He eventually applied for employment with TDCJ and was hired as a Correctional Officer at the Dominguez Unit located in Bexar County, Texas, a position he held for about 10 years, from December 6, 1990 to February 16, 2001.

During his 10 or so years of service to TDCJ, Assistant Warden Kenneth Karl (hereinafter "Warden Karl") supervised McFadden and described McFadden as a good employee who "stood out" because of his "professional appearance," was "sharp," "intelligent," appeared for work as required, and performed his job responsibilities as required. McFadden was a good employee.

A. McFadden Suffered an On-The-Job Injury While Coming to the Aid of a Fallen Officer

On August 10, 2000, McFadden was assigned to work the "administrative segregation" unit where high-risk offenders are housed, including dangerous prison gang members from the Texas Syndicate, the Texas Mafia, the Bloods, and Crips. Specifically, McFadden was injured when he came to the aid of a fellow officer, Sergeant Lewis, who was attacked by a violent inmate while being transported to the unit's infirmary. Instinctively, McFadden tackled the violent inmate, who at the time had beaten Sergeant Lewis to the ground and was continuing to beat him with his fists.

By the time law and order was restored, McFadden had saved his fellow officer, but the violent inmate had torn ligaments in McFadden's right wrist. The injury was all the more debilitating because McFadden is right-handed.

B. McFadden Filed a Workman's Compensation Claim and Was Placed on Six Months of Leave to Recover From the Attack

On the same day of his injury, McFadden filed an undisputed workman's compensation claim for an "inmate assault" and was sent home. The next day, August 11th, McFadden visited Dr. Stephen Bower and, later, Dr. Paul Pace for a medical evaluation of his injured wrist. Dr. Pace informed McFadden that surgery was the only viable treatment for his torn ligaments.

In anticipation of the recommended surgery, McFadden began to make the necessary preparations to take his medical leave. He completed a TDCJ Form C-80 Part B, TDCJ's Utilization of Sick and Vacation Leave form, and TDCJ's Family and Medical Leave (FML)/Sick Leave Notification electing a combined medical and sick leave for a minimum of six months, plus additional leave time for other types of accrued leave, in order to allow his torn ligaments to heal.

On or about August 21, 2000, McFadden underwent surgery to repair the torn ligaments. Dr. Pace performed surgery on McFadden for about two hours, removed some damaged tissue, and installed 4 to 6 pins in his wrist. The pins were removed later during a second surgery. Dr. Pace recommended a 4 to 6 month recovery period, a recovery period that McFadden understood would keep him out of work at least until January of 2001.

Roxann Redus (hereinafter "Redus"), Human Resource Specialist II, and Andrew Britt (hereinafter "Britt"), the Safety Officer/Risk Manager, both held responsibilities for TDCJ's return-to-work program. According to Redus and Britt, McFadden's medical leave, if approved by his doctor, would have permitted him to remain off-duty for up to six months or until February 16, 2001.

At no time during McFadden's medical leave did either Redus or Britt communicate by telephone or correspond in writing with McFadden about his status, recovery, or prognosis. This included the months of September, October, November, or December of 2000. Furthermore, neither Redus nor Britt ever communicated to McFadden that he needed to call in during the time he was recovering from the surgery and undergoing therapy.

C. McFadden Returned to Work Two Weeks Early With Restrictions

Dr. Pace eventually identified McFadden's return-to-work date as February 2, 2001, the day McFadden showed for his first day back on the job. McFadden's return-to-work was subject to the restrictions noted on Part III, Boxes 14, 15, 16 and 19 of the Texas Workers', including restrictions on McFadden's "R Hand/Wrist," "R Arm," and the further restriction that McFadden "Must wear splint/cast at work." McFadden's doctor had also scheduled a follow-up medical evaluation for February 12, 2001.

In accordance with what was expected of him, McFadden appeared for work on February 2, 2001, in full uniform but wearing the splint on his right arm. He informed his supervisors that because he was under physician-ordered restrictions, he could perform most, but not all of his job

duties. McFadden specifically told Britt that he could perform most of his duties, but could not do "pat down" searches and "climbing ladders" because of the splint and some slight pain.

Britt repeatedly described McFadden as having a "full release", ready for "full duty", "in a full duty position", and released to "full duty status". However, under cross-examination and when asked specifically if McFadden's medical documentation expressly declared that he was released to "full duty," Britt recanted and acknowledged that the documentation made no mention of "full duty." Redus recognized that McFadden returned with restrictions for a "wrist brace on his right arm."

D. TDCJ Denied McFadden a "Light Duty" Position Although He was Eligible for It

Redus testified that with the noted restrictions, McFadden could have qualified for a light-duty assignment. Britt testified in response to Judge Justice's questions that employees on "light duty" would not have direct contact with prisoners or offenders. He also testified that McFadden was eligible for light-duty and would not have posed a safety problem for anyone in, for example, the mailroom, yet he denied McFadden a light-duty assignment because Britt willfully, erroneously, and arbitrarily construed McFadden's release as a "full duty" release.

E. TDCJ Alleged that McFadden Violated a Work Rule to Get Medically Evaluated by His Doctor on 8 Hours Notice

Instead of doing the obviously reasonable and equitable thing, Britt demanded that McFadden go to his doctor's

office, get medically examined by his doctor, and produce a *new* Work Status Report *without any restrictions by 5:00 p.m. that day*. McFadden was concerned by such an unreasonable demand because Dr. Pace saw 150 to 200 patients per day and it was extremely difficult to see him without sufficient advance notice. In fact, McFadden's doctor prepared correspondence detailing the difficulty for a patient such as McFadden to see him on short notice because of patient volume.

Britt made this unreasonable demand despite knowing that McFadden's next scheduled medical examination, as noted by his doctor and his Work Status Report, was February 12, 2001. Britt unreasonably expected McFadden to appear for an appointment by the close of business, receive a thorough medical evaluation, obtain a revised Work Status Report, and, if necessary, to call on the weekend. Moreover, Britt's "high pressure" tactics in attempting to coerce McFadden to produce medical documentation on such short notice violated both the letter and spirit of TDCJ policy protecting employees who had suffered workman's compensation injuries.

Surprised, McFadden told Britt that he could not meet these demands and reminded Britt 3 times that his next doctor's appointment was set for February 12, 2001. Nonetheless, he tried to set an appointment with Dr. Pace on February 2, 2001, but without success. Even Redus acknowledged that this was a difficult task.

Britt testified that, in approximately 30 to 35 prior workman's compensation cases, he had *never* demanded that an employee bring a doctor's note by the end of the day. Redus testified that Britt's demand that McFadden produce a new Work Status Report without any restriction *that day* was unsupported by any written TDCJ policy or custom. In other

words, TDCJ, by and through Britt, subjected McFadden to a non-existent "work rule" that had never been applied to anyone before.

Warden Karl testified that he was unaware of any instance where an employee was terminated for failure to obtain a doctor's evaluation on one day's notice or terminated for failure to call in every day while on workman's compensation leave. Finally, Britt never told McFadden that failure to get medically examined or bring a new Work Status Report by 5:00 p.m. on February 2, 2001, would be considered "insubordination" or result in a reprimand.

Redus testified that she followed-up to see if McFadden had visited his doctor as directed. She called McFadden once on February 5, 2001, and once again on February 6, 2001, and that she left a message on McFadden's telephone answering machine both times. McFadden testified that Redus left a message for him on February 5, 2001, only. The message was of a general nature and did not contain any admonishments, directives, or threats of disciplinary action, such as a reprimand or termination. To this point, neither Britt nor Redus ever notified McFadden, either verbally or in writing, that he was subject to any disciplinary measures.

F. Redus Terminated McFadden for Failing to Get Medically Evaluated by His Doctor on 8 Hours Notice

While McFadden was urgently trying to see his doctor, Redus proceeded to prepare and mail written documentation to McFadden notifying him of his Expiration of Leave Without Pay, advising him of his Payroll Status Change as a "Separation - Expiration of 6 months LWOP," and asking McFadden to "turn in all of your state issued property: shirts, pants, jacket, belt, and I.D. Thanks . . . . Roxann."

Redus prepared the termination letter on February 2, 2001, and sent it to McFadden by postmark dated February 7, 2001.

G. Britt Filed a Written Charge of Disciplinary Infraction Against McFadden Without Authority and Without Telling Him

Britt testified that in the evening of Friday, February 2, 2001, sometime after 5:45 p.m., he prepared a Rule 13 Failure to Obey a Proper Order written charge of disciplinary infraction (hereinafter "Rule 13 Charge") against McFadden for "his failure to bring in a bona fide return to work status form on February 2, 2001, by 5:00 p.m. as instructed" in violation of PD-22. Britt also testified that, in his estimation, McFadden's only violation as of February 2, 2001, was his "failure to bring in a bona fide return to work status form on February 2, 2001, by 5:00 p.m. as instructed."

Britt stated that he had *never* written a charge of disciplinary infraction against any employee at the Dominguez Unit. Britt made the charge of disciplinary infraction against McFadden even though Britt was a civilian and not in McFadden's law enforcement chain of command. Britt also testified that he gave the Rule 13 Charge against McFadden to Captain Dan Dalton either on Friday, February 2, 2003 or the following Monday, February 5, 2003.

After he supposedly gave the Charge to Cpt. Dalton, McFadden called Britt by telephone on February 9, 2001. During the telephone conversation, Britt spoke to McFadden about his return-to-work status, but never mentioned to him that he (Britt) had filed a Rule 13 Charge against McFadden or that McFadden was subject to disciplinary measures. McFadden again requested the opportunity to report for work on light duty.

H. Dalton Contradicted the Date, Time and Manner that Britt Said He Processed the Rule 13 Charge Against McFadden

Cpt. Dan Dalton (hereinafter "Dalton") testified that Britt did *not* give him the Rule 13 Charge on either February 2 or February 5, 2001, as Britt said he did. Dalton said that he received the Rule 13 Charge from Major Johnson, Warden Karl, or Warden Kinker *on February 22, 2001*, at least two weeks after Britt said he prepared it. As Disciplinary Captain, it was Dalton's responsibility to conduct an investigation into Britt's Rule 13 Charge against McFadden.

Dalton could not explain the 20-day delay between February 2, 2001, the date Britt supposedly prepared the Rule 13 Charge and February 22, 2001, the date that Dalton says he received the Rule 13 Charge and opened his investigation. TDCJ policy requires that employees must be advised of a charge of disciplinary infraction within 10 work-days.

After Dalton commenced his investigation, he spoke to McFadden, who he described as "cooperative" and not "rude." Dalton could neither confirm nor deny that McFadden had committed an infraction of any kind. Dalton had never seen Redus' February 2, 2001, "Letter of Separation" during his investigation, which he took to be a termination letter that was not forwarded to him for his February 22, 2001, investigation. In other words, Dalton did not know that he was conducting an investigation into a potentially terminated employee.

I. Kinker Dropped the First Alleged Work Rule Violation and Alleged That McFadden Violated a Second Alleged Work Rule: Failing to Call in Every Day While on Workman's Compensation Leave

In preparation for his hearing, McFadden received a Notification of Employee Hearing that identified Rule 13 as the subject of the employee grievance hearing and he prepared for the hearing based upon this Notification. McFadden appeared at the hearing on March 5, 2001, prepared to defend himself against Britt's claim that McFadden violated Rule 13 "failure to bring in a bona fide return to work status form on February 2, 2001, by 5:00 p.m. as instructed."

Kinker, however, *changed* the scope of McFadden's hearing when he revised the infraction from a Rule 13 Charge to a Rule 20 Charge – Violation of Policies and Procedures because he thought the original charge was unreasonable. The first time McFadden would have known about the change would have been *at the hearing itself.* Acknowledging that Britt's purported reason for filing a Rule 13 Charge against McFadden could not be supported, Kinker changed the basis of the disciplinary action to Rule 20 because it was patently unreasonable for an employee to have been forced to receive a doctor's medical evaluation within 8 hours.

Kinker settled on an equally implausible basis for disciplining McFadden – that he failed to call in every day after February 2, 2001, or responding to "repeated attempts" by TDCJ personnel to contact him. The record, however, reflected that McFadden appeared for work on February 2, 2001, and was sent home; that Redus prepared a termination letter that day (February 2, 2001); that neither Redus nor Britt ever told McFadden he had to call in "everyday"; that Redus called McFadden once (according to McFadden) or maybe

twice around February 5, and 6, 2001, and left a generic message or two; and that McFadden himself called Britt on February 9, 2001, at which time Britt made no mention of policy violations.

Britt testified that TDCJ did not maintain any written policy requiring an employee on worker's compensation leave to call in "every day." Moreover, Britt, as the Safety Officer/Risk Manager, contradicted Kinker's contention that McFadden violated a TDCJ policy by failing to call in every day when he testified that as of December 2000, McFadden was not in violation of *any* policy of which he was aware. Finally, McFadden testified that if TDCJ policy required an employee on workman's compensation leave to call in every day, he was never charged for violating this alleged policy during the months of September, October, November, and December of 2000. In fact, TDCJ did not charge him with this violation until March 5, 2001, during his grievance hearing and well after the alleged infraction occurred.

McFadden was dumbfounded because he was *never* made aware that he was being accused of failing to call in everyday, he was *not* prepared to defend himself against the Charge that was made against him the day of his hearing, and it was his third offense within a one year period. Because TDCJ maintained a "three strikes and you're out" work rule of terminating employees for accruing three violations in a one year period, McFadden's employment was terminated on that basis.

J. TDCJ Applies a Universal "Three Strikes and You're Out" Work Rule McFadden was a victim of the "Three Strikes and You're Out" work rule.

Specifically, Warden Kinker and Redus said that five

other employees were terminated under the Three Strikes policy. These employees were terminated for having three violations within a year. Specifically, the violation time period was from March 2000 through March 2001.

The employees terminated under this policy were listed as receiving a "disciplinary termination." Of the five employees terminated, two were black, two were Hispanic and one was a white male. The white male was the only employee whose termination was reversed.

Similarly, McFadden was terminated under this Three Strikes Work Rule, while Lyle Kesner, a white male, was not. Also significant was the fact that McFadden was fast approaching the one-year mark for termination based on the Three Strikes Rule, being proposed for termination in February, only a few days or weeks before the last day of the Three Strikes period in March.

STANDARD OF REVIEW

A. The Rule 50 Judgment as a Matter of Law Standard

Federal Rule of Civil Procedure 50 authorizes the Court to render a judgment as a matter of law against a party who has been fully heard on an issue. FED. R. CIV. P. 50. A party must present "substantial evidence ... of such quality and weight that reasonable and fair-minded [persons] in the exercise of impartial judgment might reach different conclusion." Boeing Co. v. Shipman, 411 F. 2d 365, 374 (5th Cir. 1969).

The standard of review utilized by this Court in reviewing the grant of a Motion for Judgment as a Matter of Law was

succinctly set forth in Wallace v. Methodist Hosp. Sys., 271 F.3d 212 (5th Cir. 2001).

When a case is tried to a jury, it is the function of the jury to weigh evidence. Green v. Adm'rs of Tulane Educ. Fund, 284 F.3d 642, 653 (5th Cir. 2002). Attributing weight to conflicting evidence and drawing inferences from such evidence are within the province of the jury and its decision should be given deference if the record contains any competent evidence to support its findings. Id. Although the entire record is reviewed as a whole, the Court must disregard all evidence favorable to the moving party that the jury is not required to believe. Reeves, 530 U.S. at 151.

Therefore, the Court properly grants a Rule 50 Motion for Judgment as a matter of law *only* where the facts and inferences indicate a particular outcome *so strenuously that reasonable minds could not disagree*. Aguillard v. McGowen, 207 F.3d 226, 228 - 29 (5th Cir. 2000); see also Thrash v. State Farm Fire & Cas. Co., 992 F.2d 1354, 1356 (5th Cir. 1993). In conducting its analysis, the Court should consider all the evidence in the light most favorable to McFadden. Info. Comm. Corp. v. Unisys Corp., 181 F.3d 629, 633 (5th Cir. 1999) (quoting Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc)).

Because all parties have presented their evidence, TDCJ had ample opportunity to be fully heard on all issues. Polanco v. City of Austin, 78 F.3d 968 (5th Cir. 1996). TDCJ did not at trial, and does not now, attack the Court's jury instructions or charge. Deines v. Tex. Dep't of Protective and Reg. Servs. Co., 164 F.3d 277, 279 (5th Cir. 1999). The Fifth Circuit erroneously affirmed the District Court's grant of judgment as a matter of law.

SUMMARY OF ARGUMENT

McFadden put forth legally sufficient evidence to establish his claims of race-based discrimination against TDCJ. Using the "indirect proof" method, McFadden made out a *prima facie* case of discrimination against TDCJ. He then produced sufficient evidence to rebut each of the alleged nondiscriminatory reasons supporting his termination that were articulated by TDCJ showing that none were worthy of credence.

This evidence, in conjunction with McFadden's other circumstantial evidence of discrimination was sufficient to establish a jury issue on the question of discriminatory intent, such that the grant of a judgment as a matter of law against McFadden on this issue was erroneous. Reversal of the District Court's Judgment as a Matter of Law is therefore compulsory.

Likewise, McFadden provided sufficient evidence of his economic and emotional damages and TDCJ did not establish its defenses to these damage elements as a matter of law. The jury's finding that TDCJ intentionally discriminated against McFadden is not against the greater weight of the evidence, nor are any of the items of damage awarded unsupported by the greater weight of the evidence or excessive in amount. In hindsight, the District Court abused its discretion in granting TDCJ's Motion for Judgment as a Matter of Law.

The District Court impermissibly re-weighed the evidence and re-evaluated the credibility of witnesses in a manner that supported TDCJ's request for Judgment as a Matter of Law. Hiltgen v. Sumrall, 47 F.3d 695, 699 (5th Cir. 1995). The rule of law is that a verdict in favor of McFadden must stand unless "there is no legally sufficient evidentiary basis for a

reasonable jury to find" as it did. Vadie v. Mississippi State Univ., 218 F.3d 365, 372 (5th Cir. 2000). After a case has been fully tried on the merits, such as the case at bar, the inquiry shifts from whether McFadden has made a *prima facie* case of discrimination to whether the record contains sufficient evidence of discrimination. Harrington v. Harris, 118 F.3d 359, 367 (5th Cir. 1997).

The Fifth Circuit took the most drastic action in the life of a trial: affirming the District Court's overturning a jury verdict. The District Court itself acknowledged precarious position when it granted TDCJ's motion "with extreme" caution while describing TDCJ's decision to terminate McFadden as "totally unfair." (R. 362 - 373).

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT COMMITTED CLEAR AND REVERSIBLE ERROR WHEN IT ERRONEOUSLY GRANTED JUDGMENT AS A MATTER OF LAW IN FAVOR OF Respondent

McFadden claimed that he was unlawfully terminated because of his race. TDCJ, conversely, claimed that it terminated McFadden because he engaged in two work rule violations: 1) he failed to obtain a doctor's evaluation on 8 hours notice; and 2) he failed to call in every day while on workman's compensation leave. McFadden violated neither of these bogus rules, but was terminated based upon the "three strikes and you're out" rule.

The evidence established that TDCJ's first alleged work rule was abandoned by TDCJ as patently phony. The evidence also established that TDCJ's second alleged work rule violation was equally contrived. TDCJ's alleged reasons

for terminating McFadden were, as will be demonstrated herein, simply a pretext for discrimination.

At trial, McFadden offered evidence supporting an inference of discrimination by establishing his *prima facie* case and thereafter, offering evidence showing that: 1) he did not violate the work rule TDCJ alleges because they did not exist; and alternatively, 2) if he did violate a work rule, others outside of his protected class also violated the work rule and were treated more favorably. Green v. Armstrong Rubber Co., 612 F.2d 967, 968 (5th Cir.), cert. denied, 449 U.S. 879, 101 S. Ct. 227, 66 L. Ed. 2d 102 (1980). The evidence McFadden submitted at time of trial rebutted each of TDCJ's proffered reasons for firing him and showed they were unworthy of credence. These factors, along with other circumstantial evidence, allowed McFadden to satisfy his ultimate burden of persuading the jury that his termination was motivated by discrimination.

Under the "direct proof" method, a plaintiff must show either an acknowledgment of discriminatory intent by the defendant or its agents (such as a "smoking gun" admission of discriminatory animus), or circumstantial evidence that provides the basis for an inference of intentional discrimination. Fierros v. Texas Dep't of Health, 274 F.3d 187, 192 (5th Cir. 2001); Gowesky v. Singing River Hosp. Sys., 321 F.3d 503, 511 (5th Cir. 2003). Under the more common "indirect proof" method, the plaintiff still bears the "ultimate burden of persuading the trier of fact." Wallace, 271 F.3d at 219. However, the "indirect proof" method of proving intentional discrimination is established through the familiar McDonnel Douglas/Burdine analysis.

This framework first requires McFadden to establish a *prima facie* case for discrimination on a work rule violation:

either he did not violate the work rule; or, where it is undisputed that McFadden did, in fact, violate a work rule, McFadden must show that non-African-American employees were treated differently under circumstances "nearly identical" to his. Little v. Republic Ref. Co., 924 F.2d 93, 97 (5th Cir. 1991); Smith v. Wal-Mart Stores, 891 F.2d 1177, 1180 (5th Cir. 1990); Davin v. Delta Air Lines. Inc., 678 F.2d 567, 570-71 (5th Cir. 1982); Malveaux v. Condea Vista Co., 85 F. Supp. 2d 655 (W.D. La. 1999). McFadden offered the direct testimony of witnesses who could not identify any other employee, African-American or otherwise, who was charged with misconduct for failing to see a doctor on 8 hours notice or for failing to call in every day. Harris v. Plastics Mfg. Co., 617 F.2d 438, 440 (5th Cir. 1980).

Once established, a presumption of discrimination is raised and the burden then shifts to the defendant to produce some evidence of a legitimate, non-discriminatory reason for the adverse employment decision. Wallace, 271 F.3d at 219. If the employer produces a nondiscriminatory reason for termination, the presumption of discrimination dissipates. Id. The burden is then on the plaintiff to persuade the trier of fact by a preponderance of the evidence that the employer intentionally discriminated against him because of his protected status. See Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511-12, 113 S. Ct. 2742 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. at 802. "This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination." Burdine, 450 U.S. at 256.

The plaintiff must then rebut the employer's proffered nondiscriminatory reasons for the employment decision by producing evidence that the employer's reasons are a pretext

for discrimination. Id. The plaintiff must put forward evidence rebutting each of the non-discriminatory reasons the employer articulates. Wallace, 271 F.3d at 220. A plaintiff can establish pretext indirectly by providing evidence of disparate treatment, or by showing that the employer's stated reasons are not worthy of credence and therefore are not the real reasons for the employment decision. Id.

The seminal decision guiding this Court's legal analysis of McFadden's evidence of discrimination is Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S.Ct. 2097 (2000). In Reeves, the United State Supreme Court held that an employment discrimination plaintiff may survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a *prima facie* case under the McDonnell Douglas/Burdine formulation; and second, evidence from which a rational fact finder could conclude that the employer's proffered explanation for its actions was false. Id. The Supreme Court reversed the Fifth Circuit's decision in Reeves because it required the plaintiff to offer some proof beyond these two categories to establish sufficient evidence of discriminatory intent. The Fifth Circuit committed the same error.

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination and it may be quite persuasive. Id. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Id. citing Wright v. West, 505 U.S. 277, 296, 112 S. Ct. 2482 (1992). Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason

for its decision. Reeves, 530 U.S. at 147. "When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with some reason, based his decision on an impermissible consideration." Id., citing Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S. Ct. 2943 (1978) (emphasis in original).

Unfortunately, the Fifth Circuit essentially re-weighed the evidence and re-evaluated the credibility of witnesses in a manner that supported TDCJ's request for Judgment as a Matter of Law. Hiltgen v. Sumrall, 47 F.3d 695, 699 (5th Cir. 1995). The plain rule of law is that the verdict in favor of McFadden must stand unless "there is no legally sufficient evidentiary basis for a reasonable jury to find" as it did. Vadie v. Mississippi State Univ., 218 F.3d 365, 372 (5th Cir. 2000). After a case has been fully tried on the merits, such as the case at bar, the inquiry shifts from whether McFadden has made a *prima facie* case of discrimination to whether the record contains sufficient evidence of discrimination. Harrington v. Harris, 118 F.3d 359, 367 (5th Cir. 1997). The Fifth Circuit discarded the jury's credibility determinations and substituted its own.

A. McFadden Created His Title VII "Work Rule" *Prima Facie* Case

Under the Green v. Armstrong Rubber Co. framework, McFadden established a *prima facie* case of discrimination by showing that he was African-American when he was terminated and, as such, was a member of a protected class under 42 U.S.C. § 2000e 2(a). (R. 7 - 17; 60 - 71; Vol. I, p. 4:19 - 25). Secondly, McFadden proved that he did not violate the "work rules" alleged by TDCJ. Alternatively and

thirdly, McFadden established that if he did, the applicable work-rule was the "three strikes you're out" rule where non-African-American employees were more favorably treated.

Since McFadden established a *prima facie* case of discrimination, it became the responsibility of TDCJ to articulate specific non-discriminatory reasons supporting its decision to terminate McFadden. TDCJ proposed two reasons justifying McFadden's dismissal. As will be shown, none are worthy of credence and are merely pretexts for discrimination.

B. McFadden Provided Sufficient Evidence Upon Which a Jury Could Conclude that TDCJ's Proffered Reasons for Terminating him Were a Pretext for Discrimination

At trial, McFadden offered sufficient evidence to convince the jury that TDCJ's proffered reasons for its decision to terminate McFadden were not worthy of credence. In this regard, it is important to understand that McFadden was not required to show that TDCJ's stated reasons for terminating him were factually false, although he accomplished this much. Rather, McFadden was only required to prove that the stated reasons for his termination were not the real reasons for his termination, but were only a "pretext for discrimination." See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. at 143 (plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.").

1. TDCJ Accused McFadden of Violating Phony Work Rules

McFadden did not have to prove that he in fact was

required by TDCJ rule or policy to obtain a doctor's evaluation on 8 hours notice or to call in every day during the time he was recovering from his workplace injury. He need only offer evidence that failing to obtain a doctor's evaluation on 8 hours notice or failing to call in *every day* during the time he was recovering from his workplace injury, for example, were not the real reasons he was fired but that they were used as an excuse to discriminate against him.

A plaintiff bringing a claim under Title VII may show that the employer's stated reasons are pretextual, either by offering evidence of disparate treatment, or by offering evidence that the employer's alleged non-discriminatory reasons are not worthy of credence. McFadden not only presented evidence of disparate treatment, but also established that the reasons given by TDCJ for his termination were not worthy of credence. McFadden proved that TDCJ's proffered reasons for terminating him were not worthy of credence because they were either formulated out of personal animosity towards McFadden, or the reasons were notable and peculiar deviations from agency policy. In fact, the first proffered reason – failure to bring a doctor's release was on 8 hours notice – was so absurd that the Warden himself rejected it.

Additionally, TDCJ arbitrarily deprived McFadden of any opportunity to respond to the allegations made against him in the course of his grievance. The grievance "hearing" afforded McFadden was supposed to be a forum in which he received notice of the accusations made against him and his opportunity to be heard. Instead, it was a kangaroo court in which rules of equity and fairness were ignored. The totality of the evidence and circumstances McFadden provided the jury formed a more than sufficient evidence upon which they could believe that TDCJ's real basis for termination was discriminatory, either on its own, or in conjunction with

McFadden's *prima facie* case.

McFadden presented a case of discrimination based upon claims that he was terminated for phony work-rule violations or, alternatively, that he was terminated for work-rule violations when non-African-Americans were not. With respect to the return-to-work dates, Plaintiff submits that the jury could conclude that McFadden's doctor prepared a *restricted* return-to-work Texas Workers' Compensation Work Status Report for February 2, 2001. McFadden's doctor identified February 2, 2001, as the date for full return-to-work subject to numerous restrictions obviously noted on Part III, Boxes 14, 15, 16 and 19 of the Texas Workers' Compensation Work Status Report, including restrictions on Plaintiff's "R Hand/Wrist," "R Arm," and the further restriction that McFadden "Must wear splint/cast at work." McFadden told his supervisors that his doctor had also scheduled his next expected follow-up visit as February 12, 2001, a fact that is undisputed by other witnesses.

McFadden then presented evidence and testimony that on the evening of February 2, 2001, after 5:00 p.m., Britt prepared a Rule 13 Failure to Obey a Proper Order written charge of disciplinary infraction (hereinafter "Rule 13 Charge") against him for "his failure to bring in a bona fide return to work status form on February 2, 2001 by 5:00 p.m. as instructed." Dalton testified that Britt failed to give him the Rule 13 Charge on either February 2 or February 5, 2001, as Britt said he did. Dalton said that he received the Rule 13 Charge from Major Johnson, Warden Karl, or Warden Kinker *on February 22, 2001*, at least two weeks after Britt prepared it and after the required ten-day period.

McFadden appeared at the scheduled hearing on March 5, 2001 prepared to defend himself against Britt's claim that he

violated Rule 13 "failure to bring in a bona fide return to work status form on February 2, 2001 by 5:00 p.m. as instructed." Kinker, however, *changed* the scope of McFadden's hearing when he revised the infraction from a Rule 13 Charge to a Rule 20 Charge – Violation of Policies and Procedures. Kinker testified that the first time Plaintiff would have known about the change would have been *at the hearing itself.*

The jury, as the finder of fact, was entrusted to make factual findings and credibility determinations regarding these major deviations from basic principles of equity and fairness. Based upon the holding in Reeves, the jury was free to determine whether or not these major deviations were part of a legitimate, non-discriminatory reasons or pure pre-text.

2. TDCJ Applied a "Double-Standard" to McFadden and Anglo Officers

Finally, the trial testimony established that a clear double-standard applied to minority and Anglo employees when adverse employment actions were involved. Witnesses testified that employees who accrued three reprimands of various kinds were subject to a universally accepted work rule: "three strikes and you're out". Kinker testified that Lyle Kastner, a white male employee, was the only employee with "three strikes" to keep his job while the remaining employees, "minorities and women," were not. Warren Moore, Ph.D., testified that its procedural violations regarding McFadden would have made him eligible for "recourse" and reinstatement to his job.

With respect to Lyle Kastner, McFadden submits that the Court incorrectly reduced the comparison to one of mediation only. McFadden and Kastner both were terminated for the

"three strikes and you're out" rule and both contested their terminations. While the Court believes that the evidence regarding the double-standard could not support a finding of discrimination, the jury was again presented with evidence it construed in favor of McFadden. The jury's conclusions should stand.

C. The Fifth Circuit Erroneously Applied the Wrong Standard to McFadden's Evidence

The Fifth Circuit in this case made the same error repudiated by Reeves. Specifically, the Fifth Circuit disregarded evidence supporting McFadden's *prima facie* case and undermining TDCJ's non-discriminatory explanation. Additionally, the Fifth Circuit failed to draw all reasonable inferences in favor of McFadden by discrediting TDCJ's phony work rule violations. See Reeves, 530 U. S. at 2111.

McFadden created a genuine issue of material fact precluding summary judgment as to his claims of discrimination under Title VII and the Texas Labor Code for filing a workman's compensation claim. A *prima facie* case and sufficient evidence to reject the employer's explanation may permit a trier of fact to determine that an employer unlawfully discriminated and may, therefore, be enough to prevent summary judgment. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 148 (2000).

In its Order on Defendant's Motion for Summary Judgment, the District Court found that the evidence adduced by McFadden taken as a whole (1) created a fact issue as to whether TDCJ's stated reasons actually motivated it; and, (2) creates a reasonable inference that race was a determinative factor in the actions of which McFadden complains. Pratt v. City of Houston, 247 F.3d 601, 606-07 (5th Cir. 2001)

(quoting Vadie v. Mississippi State Univ., 218 F.3d 365, 373 (5th Cir. 2000), cert. denied 121 S. Ct. 1092 (2001); Blow v. City of San Antonio, 236 F.3d 293, 296-97 (5th Cir. 2000); Evans v. City of Bishop, 238 F.3d 586, 590-92 (5th Cir. 2000). McFadden submits that the Fifth Circuit failed to accord sufficient weight to the evidence of disparate treatment presented at trial, unfairly raised McFadden's burden of proof beyond a preponderance of the evidence, and intervened in the jury's fact findings and credibility determinations.

At the summary judgment stage, McFadden was required to identify indirect or circumstantial evidence of gender discrimination, otherwise known as creating a *prima facie* case of race discrimination. See e.g., St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). The burden of proof then shifted to TDCJ to produce evidence that its employment decisions were based on legitimate, non-discriminatory reasons. Id.

If TDCJ satisfied this burden, the burden shifted back to McFadden to show that the legitimate reasons offered by TDCJ were not its true reasons, but rather a pretext for discrimination. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 120 S. Ct. 2097, 2105-05 (2000). McFadden's *prima facie* case, combined with sufficient evidence to find that TDCJ's asserted justification was false, permitted the trier of fact to conclude that the employer unlawfully discriminated. Id. 120 S. Ct. at 2109. More likely than not, a showing of pretext leads to an inference of discrimination because "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. Id.

D. A Reasonable Jury Found For McFadden

McFadden's case of discrimination is based upon the fact that he was terminated for phony work-rule violations. Alternatively, McFadden claims that he was terminated for work-rule violations when non-African-Americans were not. The fundamental question presented to the jury was: did TDCJ apply a different standard to McFadden?

With respect to the return-to-work dates, McFadden submits that he submitted legally sufficient evidence to show that TDCJ created phantom work rules, and then accused him of violating them. The jury, as the finder of fact and judge of credibility, engaged in a reasonable construction of McFadden's return-to-work status based upon the documents entered into evidence and the testimony of the witnesses on the stand. The Court has substituted its own credibility determinations and fact-finding conclusions for those of the jury.

Finally, the trial testimony established that a clear double-standard applied to minority and Anglo employees when adverse employment actions were involved. Witnesses testified that employees who accrued three reprimands of various kinds were subject to a universally accepted work rule: "three strikes and you're out."

In most race discrimination cases, employees are rarely in a position to present direct evidence of outright discrimination. The Title VII *prima facie* case is predicated on circumstantial evidence. McFadden's case was predicated on some direct evidence, but mostly circumstantial evidence.

McFadden respectfully submits that the jury made factual findings and credibility determinations based upon, in part,

circumstantial evidence. McFadden also submits that the jury made such determinations on a "legally sufficient evidentiary basis." See Vadie v. Mississippi State Univ., 218 F.3d 365, 372 (5th Cir. 2000).

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that the Court reverse the Fifth Circuit's Judgment in favor of Texas Department of Criminal Justice, Respondent; to render a judgment in favor of Petitioner in accordance with the jury's verdict; to remand this action to the district court for a determination of the amount of Petitioner's reasonable and necessary attorney's fees for trial and appeal; to award costs incurred in this appeal; and for such other and further relief, either at law or in equity, to which Petitioner may show himself to be justly entitled.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-50712
Summary Calendar

[Filed April 4, 2005]

DENNIS K. MCFADDEN,
Plaintiff-Appellant,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Dominguez State Jail,
Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
San Antonio Division
(No. SA 03-CA-340)

Before GARZA, DEMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:*

McFadden appeals the district court's ruling granting a motion for judgment as a matter of law ("JMOL") in favor of the Texas Department of Criminal Justice ("TDCJ"). For the following reasons, we affirm.

I. FACTS AND PROCEEDINGS

McFadden, who is black, was employed by TDCJ as a correctional officer from December 6, 1990 to February 16, 2001. On August 10, 2000, McFadden was injured in the course of an altercation with a prisoner. On that day, McFadden filed a workman's compensation claim for an "inmate assault" and was sent home. The next day, McFadden visited a doctor and was informed that surgery was necessary to repair torn ligaments in his right hand. McFadden underwent surgery on August 21, 2000 and remained on medical leave until February 2, 2001, when his physician, Dr. Pace, determined that McFadden could return to work. The parties dispute whether Dr. Pace's note authorized McFadden to return to full duty, or to duty subject to restrictions.

McFadden reported for duty on February 2 wearing a splint on his right arm. Although the doctor's form was ambiguous, McFadden's supervisors believed that McFadden was cleared for full duty. They therefore ordered McFadden to leave work and to return that afternoon by 5 p.m. with an updated doctor's report. McFadden responded that he could

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* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

not see the doctor without an appointment made in advance, and reminded his supervisors that he had an appointment scheduled for February 12, 2001. He left work as directed, and was unable to obtain an earlier appointment.

That same day, February 2, human resources specialist Roxann Redus wrote and signed a document advising McFadden that his leave without pay was expiring and that his work status was changed to "separation." The leave without pay expired on February 16, but McFadden returned to duty on February 15. The letter was accordingly voided. Also on February 2, at approximately 5:45 p.m., safety officer Andrew Britt prepared a Rule 13 disciplinary charge against McFadden for failure to bring in a new doctor's note by 5 p.m. that day as directed.[1]

Redus telephoned McFadden several times over the next several days to see if he had visited the doctor as directed. Redus left messages on February 5 and 6, telling McFadden that it was urgent for him to call the unit because he was out of compliance with policy. McFadden did not return Redus's phone calls.

On March 5, McFadden appeared at a disciplinary hearing before Warden Kinker, prepared to defend himself against Britt's Rule 13 charge regarding bringing a new doctor's note by 5 p.m. on February 2. Kinker apparently acknowledged that the Rule 13 charge was unreasonable, because it may well have been impossible for McFadden to obtain an

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[1] Dalton, the disciplinary captain, received a copy of this charge on February 22, almost three weeks after Britt said he prepared it. TDCJ policy dictates that McFadden should have had notice of the charge within ten days. The delay was unexplained.

appointment on no advance notice. Kinker changed the subject of the hearing to a Rule 20 Charge, which covers Violation of Policies and Procedures. This charge was based on the fact that McFadden failed to call in every day between February 2 and February 15. McFadden was found guilty of the Rule 20 violation, and because McFadden had two previous violations within the preceding year, which are not contested here, he was terminated pursuant to a "three strikes" rule.

On April 5, 2002, McFadden brought this action in the United States District Court for the Western District of Texas, claiming violation of Title VII of the Civil Rights Act of 1964, and § 451.001 of the Texas Labor Code. The district court denied in part TDCJ's pretrial motion for summary judgment on October 30, 2003, and the matter proceeded to trial. Following a three-day trial, on November 6, 2003, the jury returned a verdict in favor of McFadden, awarding $75,000 for back pay and $200,000 for mental anguish. Arguing that McFadden's evidence was insufficient to support the verdict, TDCJ moved for JMOL pursuant to Fed. R. Civ. P. 50(b) on December 30, 2003. The district court granted the motion in a memorandum opinion dated March 24, 2004. McFadden timely appealed on July 2, 2004.

II. STANDARD OF REVIEW

This Court reviews the district court's grant of JMOL *de novo*. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219 (5th Cir. 2001). JMOL shall be granted "when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Id.* The record must reveal "more than a mere scintilla of evidence" for this Court to reverse the grant of JMOL. *Id.*

III. DISCUSSION

A. Title VII Analytical Framework

McFadden claims that his termination was motivated by racial animus, in violation of Title VII of the Civil Rights Act of 1964. A Title VII case built on circumstantial evidence, like McFadden's, is analyzed under the *McDonnell-Douglas* framework. *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003) (citing *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)). Under this framework, the plaintiff must first create a presumption of discrimination by making out a prima facie case of discrimination. *Laxton*, 333 F.3d at 578. The burden of production then shifts to the defendant to establish nondiscriminatory reasons for its actions. *Id.* The plaintiff then bears the burden of persuading the trier of fact by a preponderance of the evidence that the employer intentionally discriminated against the plaintiff because of the plaintiff's protected status. *Id.*

To meet this burden of persuasion, the plaintiff must produce evidence showing that the proffered legitimate reason is a pretext for discrimination. *Id.* (citing *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)). The plaintiff may establish pretext either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or not credible. *Id.* "An explanation is false or unworthy of credence if it is not the real reason for the adverse employment action." *Id.*

B. Evidence of Pretext

The district court's grant of JMOL achieved the correct result because McFadden failed to introduce evidence sufficient to support a finding that TDCJ's proffered reasons for McFadden's termination were pretextual, either because disparate treatment occurred or because TDCJ's proffered explanation is false or not credible.

1. Disparate Treatment

McFadden has offered no evidence to show that any of his supervisors at TDCJ treated him less favorably than employees of other races at any stage in the disciplinary proceedings. McFadden's arguments concerning Lyle Kastner, a white male whose position was reinstated as a result of mediation, are unavailing, because McFadden does not allege discrimination in the mediation process. Evidence supporting the proposition that bias may have impacted the mediation process is not probative of whether employees of different races were treated differently in initial termination decisions.

2. Credibility of Reasons

McFadden has failed to show that TDCJ's proffered reasons for termination are not worthy of credence. McFadden argues that failing to call in every day was not a violation of any existing rule, and this may well be the case. This argument does not show, however, that McFadden was not in fact terminated for failing to call in every day. TDCJ alleges that calling in every day was an unspecified work rule, and Britt and Kinker testified that communication during an absence is regarded as important at TDCJ. While TDCJ's reasons for firing McFadden may seem arbitrary or even

unfair, as the district court suggested, McFadden has not shown that these reasons were pretextual.[2] The jury's finding of discrimination was therefore unsupported by the evidence, and JMOL was appropriate.

IV. CONCLUSION

Because McFadden failed to introduce evidence to support a finding that TDCJ's proffered reasons for his termination were pretextual, the decision of the district court granting TDCJ's motion for JMOL is AFFIRMED.

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[2] McFadden also points to the various irregularities surrounding TDCJ's handling of McFadden's case to show that the proffered reasons were pretextual. None of these irregularities, however, show that the reasons were not the real reasons for his termination.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-50712
Summary Calendar

[Filed April 4, 2005]

DENNIS K. MCFADDEN,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
TEXAS DEPARTMENT OF	)
CRIMINAL JUSTICE,	)
Dominguez State Jail,	)
Defendant-Appellee.	)
	)

Appeal from the United States District Court
For the Western District of Texas
San Antonio Division
(No. SA 03-CA-340)

Before GARZA, DEMOSS, and CLEMENT, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA 02-CA-340 WWJ

[Filed June 8, 2004]

DENNIS K. MCFADDEN,)
Plaintiff-Appellant,)
)
v.)
)
TEXAS DEPARTMENT OF)
CRIMINAL JUSTICE,)
Dominguez State Jail,)
Defendant-Appellee.)
)

ORDER

Before the Court for consideration is the Plaintiff's Motion to Alter or Amend the Judgment. After careful consideration of the parties' briefs, the Court finds nothing to upset the findings set forth in the memorandum opinion that accompanied its order entering judgment as a matter of law to TDCJ. Accordingly, the plaintiff's motion is DENIED.

SIGNED this 26th day of May, 2004.

/s/ _____
William Wayne Justice
Senior United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA 02-CA-340 WWJ

[Filed March 24, 2004]

DENNIS K. MCFADDEN, Plaintiff-Appellant,	)
v.	)
TEXAS DEPARTMENT OF CRIMINAL JUSTICE, Dominguez State Jail, Defendant-Appellee.	)

William Wayne Justice
Senior United States District Judge

MEMORANDUM OPINION

Defendant Texas Department of Criminal Justice ("TDCJ") has filed a renewal of its motion for judgment as a matter of law, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. On November 6, 2003, the jury returned a verdict in favor of Plaintiff Dennis McFadden, awarding

$75,000 for back pay and $200,000 for mental anguish. Defendant argues that the evidence presented by McFadden cannot support the verdict, and urges the Court to enter judgment in favor of TDCJ. For the reasons discussed below, the Court finds that the motion should be granted.

I.

McFadden sued TDCJ for racial discrimination and retaliation for his filing of a worker's compensation claim after his employment was terminated in early 2001. The facts of the case are laid out in this Court's previous opinion denying summary judgment. The jury found that McFadden's termination was not retaliatory, but that it did result from racial discrimination. As the Court finds insufficient evidence of discrimination, judgment shall be entered for TDCJ.

Rule 50 authorizes courts to direct entry of judgment against a party if "there is no legally sufficient evidentiary basis for a reasonable jury for find for that party on that issue." The sufficiency of the evidence is assessed under the standards put forward in *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969) (en banc), *overruled on other grounds,* 107 F.3d 331 (5th Cir. 1997) (en banc). *Boeing* instructed courts carefully to examine all the evidence presented, and draw all reasonable inferences in the light most favorable to the non-moving party. They are not authorized to weigh the evidence or determine the credibility of witnesses. Boeing, 411 F.2d at 374-75. The sole issue before the court is whether the evidence presented conflicts to such a degree that a dispute as to the proper outcome is possible.

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a

> contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied ...

Id. The non-moving party must present more than a mere scintilla of evidence to support his case. *Id.*

II.

To prevail on a Title VII claim, the plaintiff must show that his employer intentionally discriminated against him. *See United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 715, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983). In *McDonnell Douglas Corp v. Green,* 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), the Supreme Court laid out a burden-shifting analysis for cases involving indirect proof. Under this analysis, the plaintiff must first establish a prima facie case of racial discrimination. To contest a termination for allegedly violating work rules, "the plaintiff must first demonstrate by a preponderance of the evidence either that he did not violate the rule or that, if he did, white employees who engaged in similar acts were not punished similarly." *Green v. Armstrong Rubber Co.,* 612 F.2d 967, 968 (5th Cir. 1980). If the plaintiff succeeds in making out his case, the burden of production shifts to the employer to show that a legitimate nondiscriminatory reason supported the discharge. *Id.* The burden of proof, however, remains at all times with the plaintiff. *See Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). If the defendant offers a valid reason for the termination, then the burden of production shifts back to the plaintiff, who must provide some evidence that the reason was

pretextual. *See Shackelford v. Deloitte & Touche, LLP,* 190 F.3d 398, 404 (5th Cir. 1999).

Once the case has been fully tried on the merits, the inquiry moves from the adequacy of the plaintiff's prima facie case to whether the evidence he produced at trial is sufficient to sustain the verdict. *See Atkin v. Lincoln Property Co.,* 991 F.2d 268, 271 (5th Cir. 1993); *United States Postal Service Bd. of Governors v. Aikens,* 460 U.S. at 715 ("Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant.").

The plaintiff must go beyond mere "speculation and conjecture" and show substantial evidence of discriminatory intent. *Lawrence v. Univ. of Tex. Med. Branch at Galveston,* 163 F.3d 309, 312 (5th Cir. 1999). Plaintiffs may not rely solely upon their "subjective belief of discrimination." *Id.* at 313. Since the factual situations of Title VII cases vary greatly, so too does the type of evidence that plaintiffs must offer. *See McDonnell Douglas,* 411 U.S. at 802 n.13. Nevertheless, to avoid summary judgment, "the evidence taken as a whole must create (1) a fact issue regarding whether each of the employer's stated reasons was what actually motivated it and (2) a reasonable inference that [the plaintiff's protected status] was a determinative factor in the actions of which plaintiff complains." *Vadie v. Mississippi State Univ.,* 218 F.3d 365, 374, n. 23 (5th Cir. 2000) (noting that this analysis, developed in *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989, 994 (5th Cir. 1996), survives the Supreme Court's abrogation of the Fifth Circuit's "pretext-plus standard" in *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)). In short, the plaintiff must not only show that the defendant's proffered reasons for the discharge were pretextual, but also

that the real reasons arose from racial discrimination. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 519, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

Employees may offer evidence of disparate treatment in order to show discrimination. Under the disparate treatment analysis, even if the employee is not qualified to perform the job from which he is terminated, if he is treated more harshly than similarly situated white employees under nearly identical circumstances, then a presumption is raised that the employer has violated Title VII. *See Barnes v. Yellow Freight Systems, Inc.,* 778 F.2d 1096, 1101 (5th Cir. 1985).

To show that TDCJ intentionally discriminated against him, McFadden argues first that he did not violate TDCJ policies, and that the disciplinary action taken against him thus must have been motivated by his race. Second, he argues that he was treated differently from employees of other races in the course of the disciplinary procedures. He has not provided enough evidence to support either contention.

1. Violation of Work Rules

McFadden argues first that he was never absent from TDCJ without clearance. He asserts that his doctor's certificate authorized him to work "full duty with restrictions," which included not performing pat-down searches or climbing ladders. He claims that he followed his doctor's orders, and was at all times on standard medical leave. He also denies that employees are required to return phone calls.

Unfortunately for McFadden, there is inadequate evidence to undermine TDCJ's demonstration of its good-faith belief that he did violate work rules. Careful examination of the

doctor's certificate indicates that it is at best ambiguous as to McFadden's limitations upon his return to work. The form admitted at trial, which was filled out by Dr. Paul Pace on January 8, 2001, lists a number of temporary limitations that would prevent McFadden from carrying out his normal duties. P-21. It indicates January 27, 2001 as the date on which he could return to full duty. "Full duty" is one of three designations authorized by the form, which reads: "Off work," "Full duty (no restrictions)," and "Temporary Alternative/Modified Duty." Pace wrote "1-27-01" in the blank "Estimated date employee will be able to return to full duty." McFadden submitted a different form in his summary judgment evidence, which was filled out by the same physician on the same date. P-2, Tab 5. This form states, "The injured employee's medical condition resulting from the workers' compensation injury: (a) will allow the employee to return to work as of 1/27/01 without restrictions; (b) will allow the employee to return to work as of 1/8/01 with the restrictions identified in Part III, which are expected to last through 1/26/01." The restrictions indicated center around the right hand/wrist. Further down the form, Pace again noted, "Return full work without restriction 1/27/0" [sic] (emphasis in the original). These two documents establish the legitimacy of the defendant's position that it expected McFadden to report for unrestricted full duty as of February 2, 2001, and that his failure to do so violated its work rules.

The plaintiff has also suggested that Risk Manager Andrew Britt's behavior upon McFadden's return was unjustified. He suggests that Britt's insistence that McFadden contact his physician to clarify his appropriate leave status was unreasonable and unsupported by TDCJ policies. A careful perusal of these policies suggests the opposite conclusion. Britt, as McFadden's Work Monitor, was required to assign him to duties consistent with the doctor's

clearance and to forward all relevant paperwork to the appropriate departments. PD-40 requires Work Monitors to "ensure that the employee has received an Authorization to Release Medical Information and Return to Work Status form," and to use that form to craft a modified duty assignment. P-10 at 7. At trial, Britt testified that he would assign an employee to light duty *after* a physician recommended it. Trial Transcript, Vol. II, at 85. He interpreted the form submitted by Pace to release McFadden to full duty. *Id.* at 86-87. Britt's demand to see an unambiguous doctor's statement before he would assign McFadden to light duty was a reflection of TDCJ policy.

McFadden's reliance on any ambiguity in the form is misplaced. Even if he were correct that he was released to restricted duty, so long as his employers operated from a genuinely mistaken belief that he could work full duty, he cannot prevail on a Title VII claim. Employers do not have to be correct in their interpretations of employees' infractions. It is enough to show that the employer was truly motivated by a nondiscriminatory assessment of the employee's violation, even if that assessment later turns out to be unjustified. Both Britt and Human Resources Specialist Roxann Redus testified that they thought McFadden was cleared to work full duty and that his failure to comply with their instructions constituted a rule violation. *Id.* at 216-20, 86. Britt and Warden Harry Kinker further testified that showing up for duty and communicating absences is regarded as extremely important at TDCJ, as the shift supervisor must know how to assign personnel. *Id.* at 90; *id.* at vol. III, p. 48. McFadden has provided no evidence to discredit this testimony or prove that this was not the real reason behind his termination.

2. Disparate Treatment

McFadden also claims that he was more harshly treated than other employees who were not members of a protected class, but he has failed to offer any adequate evidence to support this claim. He notes that no other employee was terminated for this kind of violation. This appears to be true. However, no other employee has apparently *committed* this violation. The plaintiff is obligated to present evidence that similarly situated employees suffered different treatment. *See Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995); *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 97 (5th Cir. 1991). Since McFadden has the burden, this lack of factual precedent is fatal to his case.

McFadden claims that no TDCJ rule requires employees to call in every day while on sick leave. His charge of discrimination before the Texas Commission on Human Rights and the Equal Employment Opportunity Commission states, "I know for a fact that other Hispanic and White co-workers have not called in every day while off on leave and were not discharged." P-39. At trial, plaintiff's counsel emphasized that McFadden himself did not call in during his leave without pay absence in the fall of 2000. This testimony misses the point. It is true that TDCJ does not require individuals to call in while on approved leave. However, at the time of the events at issue here, TDCJ did not consider McFadden to be on approved leave. They read his doctor's certificate as having terminated this status as of February 2, 2001. According to TDCJ policy, once the doctor approves return to full duty, the leave status ends. *See* Redus' trial testimony, vol. III, p. 216. McFadden has failed to present evidence that an employee *not* on leave had no obligation to return calls.

Likewise, McFadden does not offer evidence that in his experience or that of other employees, TDCJ tolerated injury-related absences that were not authorized by physicians' statements. On the contrary, as discussed above, TDCJ policy clearly states that these are not permitted. While the irregularities surrounding McFadden's discipline (among others, Redus sending him a letter advising him that he had been separated well before the date such separation would become effective, the delay in delivering Britt's charge to Disciplinary Hearing Officer Dan Dalton for investigation, and, most notably, the failure of all unit staff to warn McFadden that he was facing possible disciplinary procedures) are somewhat troubling, they point to a general lack of competence rather than to a conspiracy against McFadden, especially as all but the failure to warn him did not prejudice him in any way. It is at best a scintilla of evidence, which cannot prevail against the strength of the defendant's reason for the termination.

McFadden has also failed to establish discrimination during the disciplinary hearing. TDCJ policy expressly provides for the correction of the designation of infractions during the hearing. PD-22 states, "The proper characterization of the violation(s) shall be determined during the Employee Hearing. For example, an employee may have been notified that they were suspected of 'substandard duty performance,' but at the Employee Hearing it was determined that they were asleep at their duty post. The characterization of the violation would then be revised on the Reprimand Form to 'sleeping on duty.'" McFadden argues that this authorizes only a change in characterization of the same offense, not a change in the offense itself. However, he does not provide any evidence that this is the only time that wardens have changed the designation of the violation during a hearing, or that doing so is unusual. In any case, both of the charges

against him have at their root his failure to appear for work at a duty level authorized by his doctor.

In fact, McFadden has presented no evidence whatsoever that Britt, Redus, Dalton, Kinker, or officers further up the chain of command treated him less favorably than employees of other races at any stage in the proceedings. The only information McFadden offers that pertains to race is a list of five employees of the Dominguez unit who were terminated between March 2000 and March 2001. Only one, Lyle Kastner, was a white male, and his was the only position to be reinstated during the mediation process. P-41.

There are two problems with this evidence. First, it applies only to the mediation process, a final recourse for employees that is entirely separate from the termination decision, and concerning which McFadden has alleged no discrimination. Plaintiffs must show that the individuals who actually made the termination decision were prejudiced. Evidence of other employees' racial prejudice is irrelevant. *See Reeves,* 530 U.S. at 152. Consequently, evidence tending to show that reinstatement after mediation may be been based on bias does not show that the initial decision to terminate was. (There is no evidence suggesting that this was part of a larger, institutional practice of discrimination.)

Second, McFadden has supplied no information concerning the circumstances of those employees' terminations. To prove disparate treatment, a plaintiff must show "that the misconduct for which she was discharged was nearly identical to that engaged in" by another employee not within the protected class. *See Smith v. Wal-Mart Stores,* 891 F.2d 1177, 1180 (5th Cir. 1990) (quoting *Davin v. Delta Air Lines, Inc.,* 678 F.2d 567, 570 (5th Cir. 1982)). For example, in a sex discrimination case, the plaintiff's evidence that a

non-pregnant nurse performed the same procedure as the plaintiff, also without a doctor's order, and that it was also discovered by supervisors, showed disparate treatment. *See Wallace v. Methodist Hospital System,* 271 F.3d 212, 221 (5th Cir. 2001). For McFadden's evidence to be admissible, he must show that Kastner had largely the same job responsibilities, supervisors, and job conditions as McFadden, and that he violated the same rules in the same way. *See Polanco v. City of Austin,* 78 F.3d 968 (5th Cir. 1996). The limited information provided in fact demonstrates that Kastner violated different policies than both McFadden and the other employees who were not reinstated. Such evidence cannot support a finding of intentional discrimination.

It is only with extreme caution that this Court will overturn a verdict of the jury. Doing so is especially difficult in this case. This dispute arose essentially from a misunderstanding of the proper interpretation of the doctor's certificate. McFadden appears to have attempted in good faith to comply with the demands of his employer and the limitations resulting from his injury. Terminating his employment under these conditions seems totally unfair. Nevertheless, the Court is not empowered to make rulings based on matters of fairness, or to second-guess employment decisions. As Texas allows employers to retain workers at will, *see Schroeder v. Texas Iron Works,* 813 S.W.2d 483, 489, 34 Tex. Sup. Ct. J. 642 (Tex. 1991), TDCJ is authorized to discharge its guards for an unfair reason or no reason at all, so long as its reason does not run afoul of Title VII or other statutory prohibitions. As there is no evidence of racial discrimination in this case, the Court is obliged to find in favor of the defendant regarding its motion for judgment as a matter of law. It is so **ORDERED.**

SIGNED this 23rd day of March, 2004.

/s/ _____
William Wayne Justice
Senior United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA 02-CA-340 WWJ

[Filed November 6, 2003]

DENNIS K. MCFADDEN,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
TEXAS DEPARTMENT OF	)
CRIMINAL JUSTICE,	)
Dominguez State Jail,	)
Defendant-Appellee.	)
	)

VERDICT OF THE JURY

QUESTIONS No. 1 - 3: Discrimination

It is unlawful for an employer to intentionally refuse to hire or to intentionally discharge any person or otherwise discriminate against any person with respect to compensation, tenure, conditions, or privileges of employment because of such person's race.

Plaintiff Dennis McFadden claims that defendant Texas Department of Criminal Justice (TDCJ) intentionally discriminated against him because of his race. Defendant TDCJ denies this charge and asserts that it had a legitimate nondiscriminatory reason for its employment decision. It is your responsibility to decide whether plaintiff McFadden has proven his claim of intentional discrimination by the defendant by a preponderance of the evidence.

In order for plaintiff McFadden to establish his claim against defendant TDCJ, he has the burden of proving by a preponderance of the evidence that the defendant's actions were motivated by the plaintiff's race. Plaintiff McFadden must prove that defendant TDCJ intentionally discriminated against him; that is, the plaintiff's race must be proven to have been a motivating factor in the defendant's decision to terminate him. The mere fact that the plaintiff is an African-American and was terminated is not sufficient, in and of itself, to establish his claim under the law.

In showing that his race was a motivating factor, the plaintiff is not required to prove that his race was the sole motivation or even the primary motivation for the defendant's decision. He need only prove that race played a motivating part in the defendant's decision, even though other factors may also have motivated it.

The law allows the plaintiff to receive frontpay, which is compensation for lost future wages and benefits he would have earned until age 70. Front pay is the difference in the benefits and salary the plaintiff would have received from the defendant and what he is earning and receiving in his current employment, including bonuses and retirement benefits. He also seeks the present value of his lost pension benefits from the defendant.

If you award the plaintiff any amount of future losses, those losses must be reduced to their value today. That is, you may award to the plaintiff for future losses no more than the sum of money needed today, which, when added to what the sum may reasonable be expected to earn in the future by investment, will equal the amount of the plaintiffs loss. In other words, the total anticipated future loss must be reduced to an amount that, if invested at a particular rate of interest, will return an amount equal to the total anticipated future loss.

A person who claims damages resulting from the wrongful acts of another has a duty under the law to use reasonable diligence to mitigate to avoid or minimize those damages. If you find that the defendant is liable and the plaintiff has suffered damages, the plaintiff may not recover for any item of damage that he could have avoided through reasonable effort. If you find that the plaintiff unreasonably failed to take advantage of an opportunity to lessen his damages, you should deny him recovery for those damages that he would have avoided had he taken advantage of the opportunity. However, he is not required to exercise unreasonable expenses in mitigating the damages. The defendant has the burden of proving the damages that a plaintiff would have mitigated. In deciding whether to reduce a plaintiffs damages because of his failure to mitigate, you must weigh all the evidence in light of the particular circumstances of the case, using sound discretion in deciding whether the defendant has satisfied its burden of proving that the plaintiff's conduct was not reasonable.

4. Should the plaintiff be awarded back pay to compensate for a net loss of wages and benefits to the date of trial? Answer Yes or No YES.
If your answer is Yes, in what amount? $75,000.00

5. Should the plaintiff be awarded front pay to compensate for a net loss of wages and benefits to the date of retirement?
Answer Yes or No NO.
If your answer is Yes, in what amount? $0

6. Should the plaintiff be awarded damages to compensate for emotional pain and mental anguish?
Answer Yes or No YES.
If your auswer is Yes, in what amount? $200,000.00

QUESTION No. 7: Worker's Compensation

There may be more than one cause for an employment decision. An employer does not retaliate against an employee for filing a worker's compensation claim in good faith if the employer would have terminated the plaintiff when he did even if the employee had not filed a worker's compensation claim in good faith.

Keep in mind that employers are permitted to make their own business judgments and decisions. Under the law, an employer may discharge an employee for a good reason, a bad reason, for no reason at all, or for a mistaken reason, so long as the employer's decision is not made because the employee filed or pursued a worker's compensation claim.

Additionally, an employer's knowledge that an employee has filed or taken steps to file a worker's compensation claim, before his termination from employment is, in itself, insufficient to support a claim for discrimination.

7. Did defendant TDCJ discharge plaintiff McFadden because he filed a worker's compensation claim in good faith?
Answer Yes or No NO.

QUESTIONS No. 8- 9: Damages

Consider the elements of damages listed below and none other, Consider each element separately. Do not include damages for one element in any other element. Do not include interest on any amount of damages you may find.

Reduce lost wages, if any, by wages earned, if any, in the past and wages, if any, which in reasonable probability will be earned in the future.

Answer separately, in dollars and cents, for damages, if any.

The plaintiff must make every reasonable effort to minimize or reduce his damages for loss of compensation by seeking employment. This is called mitigation of damages. If you determine that the plaintiff is entitled to damages, you must reduce these damages by (1) what the plaintiff earned and (2) what the plaintiff could have earned by a reasonable effort during the period from the defendant's alleged retaliation until the date of trial.

You must decide whether the plaintiff was reasonable in not seeking or accepting a particular job. The plaintiff must accept employment that is "of a like nature." In determining whether employment is "of a like nature," you may consider:

1. The type of work;
2. The hours worked;
3. The compensation;

4. The job security;
5. The working conditions;
6. Other conditions of employment.

If you determine that the plaintiff did not make reasonable efforts to obtain a similar job, you must decide whether any damages resulted from his failure to do so. You must not compensate the plaintiff for any portion of his damages that resulted from his failure to make reasonable efforts to reduce his damages, by obtaining other similar employment.

8. What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the plaintiff for his damages, if any, that resulted from such conduct?

A. Lost earnings and employee benefits in the past between February 16, 2001 and today.

ANSWER:$ N/A

B. Lost earnings and employee benefits that in reasonable probability will be lost in the future.

ANSWER:$ N/A

C. Compensatory damages in the past, which include emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.

ANSWER:$ N/A

D. Compensatory damages in the future, which include emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.

ANSWER:$ N/A

9. Has the defendant proven by a preponderance of the evidence that the plaintiff has failed to mitigate his damages?
Answer Yes or No NO.
If your answer is Yes, in what amount? $ N/A

SO SAY WE ALL.

/s/_____
Foreperson

DATED: 06 NOV 03

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA 02-CA-340 WWJ

[Filed October 30, 2003]

DENNIS K. MCFADDEN,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
TEXAS DEPARTMENT OF	)
CRIMINAL JUSTICE,	)
Dominguez State Jail,	)
Defendant-Appellee.	)
	)

MEMORANDUM OPINION

Before the court for consideration is the defendant's motion for summary judgment. Upon careful consideration of the motion, the plaintiff's response, and the evidence, it is found that the motion should be granted in part and denied in part.

FACTUAL SUMMARY

It is undisputed that Plaintiff Dennis McFadden, who is African-American, was employed by the Texas Department of Criminal Justice (TDCJ), a state agency, as a correctional officer at the Dominguez Unit from December 6, 1990 until February 16, 2001. A part of his duties consisted of patting down prisoners and climbing stairs and ladders. *See* Def.'s Mot. for Summ. J., Ap. B, Deposition of Dennis McFadden, p. 61:10 - 62:20. On March 21, 2000, he appeared before a disciplinary committee for having violated TDCJ Rule 25E (failure to completely or accurately report a use of force) on February 25, 2000. *See* Def.'s Mot. for Summ. J., Ap. A. He was placed on probation for one month. On the same day, he faced a separate disciplinary hearing, this time for violating TDCJ Rule 36 (insubordination) on March 1, 2000. *See id.* For this offense he received five months' probation. The defendant argues that one or both of these infractions would have justified the plaintiff's termination, and that they compelled it when combined with the violation that lies at the center of this case.

Just under half a year later, on August 10, 2000, McFadden suffered an on-the-job work-related injury to his wrist. *See* Plaintiff's Ex. P-3, Deposition of Andrew Britt, p. 21:18 - 25:1. To heal, he needed surgery and several months to recover. He used his accrued leave time until it expired on August 16, 2000, and then began a period of leave without pay. *See* Def.'s Mot. for Summ. J., Ap. B, Deposition of Dennis McFadden, p. 140:1 - 21. Employees are allowed to take up to six months of such leave time, provided they have a statement from a health provider affirming that such leave is necessary. *See* Plaintiff's Ex. P-2, Deposition of Roxann Redus, p. 51:1 - 52:19; Plaintiff's Ex. P-3, Deposition of Andrew Britt, p. 26:17 - 28:5. While he was still on leave,

the human resources manager at Dominguez, Roxann Redus, warned McFadden that his failure to place a health care provider's statement in his file within 90 days of his August 10, 2000 injury represented a breach of policy, and that he must submit a doctor's evaluation by January 8, 2001. *See* Def.'s Mot. for Summ. J., Ap. B, Deposition of Dennis McFadden, p. 114:10 - 115:4. On January 8, 2001, McFadden submitted a statement from his doctor estimating that the plaintiff could immediately return to light duty with several restrictions, and that he would be able to return to full duty on January 27, 2001. *See id.* at 115:5 - 120:6. On January 16, 2001, McFadden advised Redus that the doctor had pushed the latter date back to February 2. *See id.* at 120:13 - 121:7. He gave to her a doctor's release, the proper interpretation of which is in dispute. The plaintiff points to the above-mentioned limitations language on the form, asserting that it authorized him not to perform full duty after February 2, 2001. The defendant counters that the restrictions solely applied to the period from January 8, 2001 to February 2, 2001, and that the doctor had authorized him to return to his regular assignments after that time.

McFadden reported for work on February 2, 2001, but he wore a brace and complained of wrist pains. *See* Def.'s Mot. for Summ. J., Ap. B, Deposition of Dennis McFadden, p. 140:22 141-10. This concerned his shift supervisor, who worried about his ability to perform all his tasks. He told McFadden to wait to see the warden. McFadden then met with Assistant Warden Kenneth Karl and Andrew Britt, the Dominguez Unit safety officer, who himself is African-American. *See id.* at 123:3 - 125:20. The substance of their subsequent conversation with McFadden is in dispute. The defendant asserts that the officials acknowledged that there were light duty tasks that McFadden could perform, but noted that the doctor's report appeared to clear him for full duty.

See Plaintiff's Ex. P-3, Deposition of Andrew Britt, p. 39:1 - 44:24. They felt constrained to assign him to the duty indicated by the doctor's report. *Id.* at 49:15 - 50:2. Accordingly, they asked him to provide an updated report by the end of the day. *Id.* at 45:2 45:14. He replied that he might not be able to do so, as it could be difficult to obtain an appointment on such short notice. He mentioned that he had an appointment already scheduled on January 12, 2001, and asked if he could remain on leave until that time. It is in dispute whether his supervisor agreed to that arrangement. *Compare id.* at 129:14 - 130:7, 138:18 139:25 *with* 52:11 - 53:20, 58:4-20. McFadden returned home, but was unable to obtain an earlier appointment. *See* Def.'s Mot. for Summ. J., Ap. B, Deposition of Dennis McFadden, p. 142:12 - 145:13. He did not come back to the prison until February 15, 2001, when he brought a doctor's slip that again approved him to work full duty.

During this second absence from work, Redus called McFadden several times at home to tell him that his absence was unexeused and that he was required to call in daily. *See id.* at 168:2 - 14; Def's Mot. for Summ. J., Ap. B, Ex. 23. Both the plaintiff and his wife acknowledge having received such calls. He viewed them as "harassment," however, and did not respond. *See* Def.'s Mot. for Summ. J., Ap. B, Deposition of Dennis McFadden, p. 204:15 - 205:9. It is in dispute as to whether calling in daily is required by TDCJ regulations.

On February 2, 2001, Redus wrote and signed a document advising McFadden of his Expiration of Leave Without Pay and of his Payroll Status Change as a "Separation - Expiration of 6 Months LWOP," and asking him to "turn in all of your state issued property: shirts, pants, jacket, belt, and I.D." Plaintiff's Ex. P-2, Deposition of Roxann Redus, p. 165:2 -

173:1. Redus describes this as a standard procedure when employees exceed their allotted time for leave without pay (for example, because they have not yet recovered from injuries sufficiently to return to work). Such employees are administratively "separated from employment," which, Redus testified, is different from being terminated for grounds, although it still leaves the employee jobless. *Id.* at 167:4 - 168:8. McFadden's leave expired on February 16, 2001, but he returned to work on February 15, 2001, so this document was declared void and no further action was taken. *Id.* at 168:10 - 169:4. The letter to McFadden was written and signed two full weeks before his leave expired. Redus testified that she generally writes these letters early in order to warn the employee that his separation is impending, so that he can return to work, if possible. However, this letter was not sent until five days later, February 7, 2001. *Id.* at 169:5 - 171:5. The plaintiff regards this as indicative of Redus' and Britt's collaboration to "fabricate the basis for his termination because of race-based discriminatory animus and retaliation for his filing a worker's compensation claim." Pl.'s Resp. to Def.'s Mot. for Summ. J. at 6. The defendant argues that the delay resulted from glitches in the internal mail system.

Also on February 2, 2001, after 5 p.m., Britt prepared a written Rule 13 Failure to Obey a Proper Order charge of disciplinary infraction against McFadden. The document charged McFadden with "failure to bring in a bona fide return to work status form on February 2, 2001 by 5:00 p.m. as instructed." *See* Plaintiff's Ex. P-3, Deposition of Andrew Britt, p. 69:13 - 16. Britt prepared the form under the advice of Major Tommy Johnson, the security department head officer. *Id.* at 61:18 - 62:21. Britt admitted that he had never written such a charge against an employee at the Dominguez Unit, though he had against several employees at a different jail facility. *Id.* at 67:19 - 68:5. Britt asserts that he gave the

charge to Captain Dan Dalton either that day (a Friday) or the following Monday. Bdtt talked to McFadden over the telephone on February 9, 2001, but failed to mention that he had filed a Rule 13 charge against him.

Dalton testified, in contradiction to Britt, that he did not receive the charge until February 22, 2001, three weeks later. He could not explain the delay. The plaintiff notes that TDCJ policies require an employee to be advised of a charge of disciplinary infraction within 10 days. Dalton served as disciplinary captain, and so it fell to him to conduct an investigation into the charge. However, he had no disciplinary authority himself; he simply told McFadden of "the range of punishments that he was facing if he was found guilty." He explained in testimony that his meeting was for that purpose and to possibly "get a statement from him and then to turn it into the unit reprimanding authority." Plaintiff's Ex. P-4, Deposition of Dan Dalton, p. 41:7 42:6.

McFadden's disciplinary hearing was set for March 5, 2001. He was notified that the subject of the hearing would be his violation of Rule 13 (Violation of an Order). However, Warden Harry Kinker changed the subject of the hearing to a Rule 20 charge (Violation of Policies and Procedures). *See* Plaintiff's Ex. P-5, Deposition of Harry Kinker, p. 67:2 - 68:25. Kinker acknowledges that it may have been difficult for McFadden to get a new doctor's note on such short notice, and admits that is why he changed the basis for the hearing. *See id.* at 90:14 91:20. He also admits that McFadden would not have known of this change prior to the hearing. *See Id.* at 83:11- 19. The defendant asserts that such changes during the course of the hearing are not unprecedented. *See id.* at 82:13-25. TDCJ policies allow personnel to "correct errors that may have occurred during a disciplinary hearing"; for example, they are expressly permitted to reclassify a violation that has

been "mischaracterized." Def.'s Rep. To Pl.'s Resp. to Def's Mot. for Summ. J., Ex. 5. However, the defendant does not offer evidence that TDCJ policies authorize changing the nature of the offense itself during the hearing.

The new charge cited McFadden for failing to call in every day after February 2, 2001. Kinker testified that this was a TDCJ work rule, but could not identify a specific TDCJ policy requiring it. *See id.* at 92:8 - 94:16. McFadden was not prepared to defend himself against this charge at the hearing, and his termination was recommended. The dismissal was later approved by, among others, two African-Americans, Dr. Warren Moore, the director of human resources for TDCJ, and Nathaniel Quarterman, the Deputy Director for the State Jail Division of TDCJ.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper under Rule 56(c) of the Federal Rules of Civil Procedure "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party, is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The substantive law underlying the claims at issue identifies which facts are material. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

When the moving party bears the burden ofpersuasion on an issue at trial, that party must both sustain that burden and demonstrate the absence of a genuine dispute over a material fact. *See Celotex,* 477 U.S. at 331-32 (Brennan, J.,

dissenting). When the moving party does not bear the burden of persuasion on an issue at trial, it may discharge its summary judgment burden by "showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

Once the moving party satisfies its summary judgment burden, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). When deciding a motion for summary judgment, the court must make all factual inferences in favor of the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Nevertheless, if the evidence presented by the non-moving party is insufficient for a reasonable jury to deliver a verdict in favor of that party, summary judgment should be entered. *See Anderson,* 477 U.S. at 250-51.

1. TITLE VII

The plaintiff claims that his termination was impermissibly motivated by racial discrimination in violation of Title VII of the Civil Rights Act of 1964. In *McDonnell Douglas Corp v. Green,* 411 U.S. 792 (1973), the Supreme Court laid out a burden-shifting analysis for cases in which the plaintiff seeks to show workplace discrimination with indirect proof. Under this analysis, the plaintiff must first establish a prima facie case of racial discrimination. To contest a termination for allegedly violating work rules, "the plaintiff must first demonstrate by a preponderance of the evidence either that he did not violate the rule or that, if he did, white employees who engaged in similar acts were not punished similarly." *Green v. Armstrong Rubber Co.*, 612 F.2d 967, 968 (5th Cir. 1980). If the plaintiff succeeds in making out his case, the burden shifts to the employer to show that a legitimate

nondiscriminatory reason supported the discharge. *Id.* If the defendant offers a valid reason, then the burden once again shifts to the plaintiff, who must provide some evidence that that reason served as a pretext for the racial animus that really underlay the termination. "Once a Title VII case reaches the pretext stage, the only question on summary judgment is whether there is a conflict in substantial evidence to create a jury question regarding discrimination." *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 (5th Cir. 1999).

The plaintiff must go beyond mere "speculation and conjecture" and show substantial evidence of discriminatory intent. *Lawrence v. Univ. of Tex. Med. Branch at Galveston,* 163 F.3d 309, 312 (5th Cir. 1999). Since the factual situations of Title VII cases vary greatly, so too does the type of evidence that plaintiffs must offer. *See McDonnell Douglas,* 411 U.S. at 802 n.13. Nevertheless, plaintiffs must still provide solid evidence, not just the plaintiff's "subjective belief of discrimination." *See Lawrence,* 163 F.3d at 313. To avoid summary judgment, "the evidence taken as a whole, must create (1) a fact issue regarding whether each of the employer's stated reasons was what actually motivated it and (2) a reasonable inference that race ... was a determinative factor in the actions of which plaintiff complains." *Walton v. Bisco Industries, Inc.,* 119 F.3d 368, 370 (5th Cir. 1997). In short, the plaintiff must not only show that the defendant's proffered reasons for the discharge were pretextual, but that the real reasons arose from racial discrimination.

Employees may offer evidence of disparate treatment in order to show discrimination. Under the disparate treatment analysis, even if the employee is not qualified to perform the job from which he is terminated, if he is treated more harshly than similarly situated white employees under nearly identical circumstances, then a presumption is raised that the employer

has violated Title VII. *See Barnes v. Yellow Freight Systems, Inc.*, 778 F.2d 1096, 1101 (5th Cir. 1985). In some cases, employees may also meet their burden by showing that the defendant's proffered reason is implausible. "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000). Even if the court does not go so far as to infer discriminatory intent entirely, discrediting the employer's reason for termination may assist the plaintiff's case. "[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." *Id.*

McFadden argues first that he did not violate any work rules. To support this position, he asserts that no TDCJ witness could name a specific rule that he had violated. For example, Warden Kinker testified that McFadden was obligated to call in every day from February 2 to February 15, 2001, but equivocated on what leave status would require an employee to report that way, and failed to name a specific policy calling for such action. McFadden also points to testimony from Redus, Britt, and Karl that TDCJ policies would not require McFadden to produce a new Work Status Report that day, that no other employees had been terminated for failing to provide a doctor's report on such short notice, and that McFadden was never warned that he could be fired. Alternatively, McFadden asserts that even if he did violate a rule, the defendant's inability to consistently articulate which rule that was creates a genuine issue of material fact as to whether his discharge was racially motivated.

The Court finds that the parties' dispute concerning the proper interpretation of and response to the doctor's

certificate, the inability of the defense witnesses to name specific TDCJ policies requiring immediate return with the certificate and daily checking in, and the number of irregularities surrounding the defendant's handling of McFadden's case to give rise to a genuine issue of material fact regarding whether the plaintiff did violate any work rules, and if so, whether he was terminated because of that or because of racial discrimination.

The defendant points out that even if Redus and Britt were motivated by racial discrimination, the final decision to terminate McFadden's employment was made by others, concerning whose motives the plaintiff has offered no evidence. It is well-established that evidence of other employees' racial prejudice is insufficient to show discrimination; plaintiffs must show that the actual decisionmakers were swayed by such feelings. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 152 (2000); *Mitchell v. USBI Co.*, 186 F.3d 1352, 1355 (11th Cir. 1999); *Conto. Concord Hosp., Inc.*, 265 F.3d 79,81 n.4 (lst Cir. 2001); *Cardenas v. AT& T Corp.*, 245 F.3d 994, 1000 (8th Cir. 2001). Evidence that individuals other than the final decisionmaker operated from discriminatory motives may be presented, however, in so-called "cat's paw" cases. In these circumstances, the prejudiced employees have such influence over the decision that the final decisionmaker may be seen as merely rubber-stamping the employee's termination. *See Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998); *cf. Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996)(applying the cat's paw analysis to Title VII employer liability under a theory of respondeat superior). Thus, evidence that those employees were inclined to discriminate against the employee is sufficient. Here, neither side has offered evidence about the weight a termination recommendation carries with the final panel. The parties have

put forward information regarding the investigation and hearing conducted by the warden and his subordinates, but have not indicated that the individuals that eventually terminated McFadden reexamined any of those findings. This court must view the evidence in the light most favorable to the non-moving party, and draw all reasonable inferences in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255. Accordingly, this Court finds that the evidence of discrimination regarding the lower-level employees is sufficient to proceed to trial.

2. TEXAS'S ANTI-RETALIATION LAW

McFadden also claims that his discharge constituted retaliation for his worker's compensation claim, in violation of the Anti-Retaliation Law of the Texas Labor Code, § 451.001. To make out a case for retaliatory discharge, the employee must show a causal connection between his filing for worker's compensation benefits and his discharge. *Terry v. Southern Floral Co.*, 927 S.W.2d 254, 257 (Tex.App.-Houston [1 Dist.] 1996, no writ). Retaliation need not be the sole basis for his termination, but must be "at least a determining factor in the discharge." *Id.* The causal link must be close enough so that the employee would not have been fired at the time he was had he not filed for benefits. *See Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444, 450-51 (Tex. 1996); *see also Urquidi v. Phelps Dodge Refining Corp.*, 973 S.W.2d 400, 403 (Tex.App.-El Paso, 1998, n.w.h.). Once the plaintiff has made out his prima facie case, the burden shifts to the defendant to demonstrate that a legitimate reason motivated the discharge. *See Terry*, 927 S.W.2d at 257. If the defendant is able to do so, the burden shifts once more to the plaintiff, who must produce "controverting evidence of a retaliatory motive" to survive summary judgment. *Id.* Texas courts have found

circumstantial evidence sufficient to support a retaliatory discharge claim where it shows: "(1) the employer's knowledge of the compensation claim by those making the decision to terminate; (2) a negative attitude towards the employee's injured condition; (3) failure to adhere to established company policies; (4) discriminatory treatment of the injured employee in comparison to similarly situated employees; and (5) incentives [provided by the employer] to refrain from reporting on-the-job injuries." *Urquidi*, 973 S.W.2d at 403-04.

McFadden alleges that Britt held a grudge against him because he had filed a grievance about him a year before. According to the plaintiff, that grudge provided the motivation to retaliate against him for his worker's compensation claim. The evidence produced to support this claim is insufficient to meet the summary judgment standard under the five-part test outlined above.

McFadden has arguably presented some evidence to show that TDCJ personnel knew of the plaintiff's injured condition, and that they deviated from established company policies. However, he has failed to present evidence of the other elements of a retaliation claim. Specifically, McFadden has not produced any evidence of TDCJ's hostility toward worker's compensation, either regarding the plaintiff himself or other workers. There is no indication that the jail facility provided incentives to not file for benefits or that it maintained a general practice of questioning employees' need to take leave time. McFadden points to testimony that information was circling through the grapevine that the plaintiff was out on leave and was not reporting properly. This misses the point; while it may demonstrate a low opinion of him among jail personnel, that could easily be due to McFadden's alleged misbehavior, rather than to any

predisposition against those who file for worker's compensation benefits.

Nevertheless, McFadden's contention that he did not violate a work rule may provide the basis for a retaliation claim. "Proof that the stated reason for discharge is false and that established employee policies were not followed in the termination process are probative of an improper motivation in the dismissal." *Paragon Hotel Corp. v. Ramirez*, 783 S.W.2d 654, 660 (Tex.App.-El Paso, 1989). As discussed above, McFadden has offered evidence sufficient to create a question of material fact as to whether the reasons TDCJ has put forward could support his termination. He has also submitted evidence that TDCJ failed to follow its own established employee policies. Accordingly, summary judgment on this claim will also be denied.

3. PUNITIVE DAMAGES

Government agencies are not subject to punitive damages in Title VII cases. *See* 42 U.S.C. § 1981a(b)(1). As TDCJ, a state agency, is the only listed defendant, punitive damages are not available and will not be submitted to the jury.

SIGNED this 29th day of October, 2003.

/s/_____
William Wayne Justice
Senior United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

No. SA 02-CA-340 WWJ

[Filed October 30, 2003]

DENNIS K. MCFADDEN,
Plaintiff-Appellant,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Dominguez State Jail,
Defendant-Appellee.

ORDER

In accordance with the findings set forth in the memorandum opinion of the Court in this civil action, issued simultaneously with this judgment, the defendant's motion for summary judgment shall be, and is hereby,

GRANTED in part and **DENIED** in part. The plaintiff's claim for punitive damages shall be, and is hereby, **DISMISSED**, with prejudice.

SIGNED this 29th day of October, 2003.

/s/ _____
William Wayne Justice
Senior United States District Judge

05-47

No. ~~04-50712~~

In the Supreme Court of the United States

DENNIS K. MCFADDEN,
Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Respondent.

On Petition for *Writ of Certiorari* to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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No. 04-50712

In the

Supreme Court of the United States

DENNIS K. MCFADDEN,

Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

The Court should deny McFadden's petition for *writ of certiorari* because McFadden failed to introduce evidence to support a finding that the Texas Department of Criminal Justice's proffered reasons for his termination were pre-textual. Therefore, review is unwarranted because McFadden has failed to show that the court of appeals's opinion contravenes any precedent from this Court. The facts and evidentiary record of this case fully support the court of appeals' conclusion that the district court appropriately granted the Texas Department of Criminal Justice's motion for judgment as a matter of law. Any alleged error that McFadden identifies is mere factbound application of settled law.

McFadden's arguments for review lack merit. There is no reason for this Court to grant *certiorari* on the question that McFadden presents.

STATEMENT OF THE CASE

TDCJ hired McFadden, who is Black, as a correctional officer from December 1990 to February 16, 2001. On August 10, 2000, McFadden was injured in the course of an altercation with a prisoner. On that day, McFadden filed a workman's compensation claim for an "inmate assault" and was sent home. The next day, McFadden visited a doctor and was informed that surgery was necessary to repair torn ligaments in his right hand. McFadden underwent surgery on August 21, 2000 and remained on medical leave until February 2, 2001, when his physician, Dr. Pace, determined that McFadden could return to work. The parties dispute whether Dr. Pace's note authorized McFadden to return to full duty, or to duty subject to restrictions.

McFadden reported for duty on February 2 wearing a splint on his right arm. Although the doctor's form was ambiguous, McFadden's supervisors believed that McFadden was cleared for full duty. They therefore ordered McFadden to leave work and to return that afternoon by 5 p.m. with an updated doctor's report. McFadden responded that he could not see the doctor without an appointment made in advance, and reminded his supervisors that he had an appointment scheduled for February 12, 2001. He left work as directed, and was unable to obtain an earlier appointment.

That same day, February 2, Human Resources Specialist Roxann Redus wrote and signed a document advising McFadden that his leave without pay was expiring and that his work status was changed to "separation." The leave without pay expired on February 16, but McFadden returned to duty on February 15. The letter was accordingly voided.

Also on February 2, at approximately 5:45 p.m., Safety Officer Andrew Britt prepared a Rule 13 disciplinary charge against McFadden for failure to bring in a new doctor's note by 5 p.m. that day as directed.

Redus telephoned McFadden several times over the next several days to see if he had visited the doctor as directed. Redus left messages on February 5 and 6, telling McFadden that it was urgent for him to call the unit because he was out of compliance with policy. McFadden did not return Redus's phone calls.

On March 5, McFadden appeared at a disciplinary hearing before Warden Kinker, prepared to defend himself against Britt's Rule 13 charge regarding bringing a new doctor's note by 5 p.m. on February 2. Kinker apparently acknowledged that the Rule 13 charge was unreasonable, because it may well have been impossible for McFadden to obtain an appointment on no advance notice. Kinker changed the subject of the hearing to a Rule 20 Charge, which covers Violation of Policies and Procedures. This charge was based on the fact that McFadden failed to call in every day between February 2 and February 15. McFadden was found guilty of the Rule 20 violation, and because McFadden had two previous violations within the preceding year, which are not contested here, he was terminated pursuant to a "three strikes" rule.

On April 5, 2002, McFadden brought this action in the United States District Court for the Western District of Texas, claiming violation of Title VII of the Civil Rights Act of 1964, and § 451.001 of the Texas Labor Code. The district court denied in part TDCJ's pretrial motion for summary judgment on October 30, 2003, and the matter proceeded to trial. Following a three-day trial, on November 6, 2003 before the Honorable William Wayne Justice, the jury returned a verdict in favor of McFadden, awarding $75,000 for back pay and $200,000 for mental anguish. The jury found that McFadden's termination was not retaliatory, but that it did result

from racial discrimination. Arguing that McFadden's evidence was insufficient to support the verdict, TDCJ renewed its' motion for judgment as a matter of law (JMOL) under FED. R. CIV. P 50(b) on December 30, 2003. The district court granted the motion in a memorandum opinion dated March 24, 2004. The trial court found, *inter alia,*

> [t]he plaintiff is obligated to present evidence that similarly situated employees suffered different treatment. *See Mayberry v. Vaught Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995); *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 97 (5th Cir. 1991). Since McFadden has the burden, this lack of factual precedent is fatal to his case.

Therefore, the trial court entered judgment for TDCJ. Plaintiff filed a motion to alter or amend the judgment under FED. R. CIV. P. 59. The court denied this motion. McFadden timely appealed on July 2, 2004.

In a *per curiam* opinion, guided by precedent of this Court and the Fifth Circuit, the court of appeals concluded that the district court's judgment should be affirmed.

REASONS TO DENY THE PETITION

McFadden cannot overcome the absence of evidence in the record. Therefore there is no basis to reverse the grant of Judgment as a Matter of Law (JMOL).

I. IN LIGHT OF THE RELEVANT FACTS, THE COURT OF APPEALS' DECISION COMPORTS WITH THIS COURT'S PRECEDENT.

A. Title VII Analytical Framework

McFadden claims that his termination was motivated by racial animus, in violation of Title VII of the civil Rights Act of 1964. A Title VII case built on circumstantial evidence, like McFadden's, is analyzed under the McDonnell-Douglas framework. *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003) (citing *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). Under this framework, the plaintiff must first create a presumption of discrimination by making out a *prima facie* case of discrimination. *Laxton*, 333 F.3d at 578. The burden of production then shifts to the defendant to establish nondiscriminatory reasons for its actions. *Id.* The plaintiff then bears the burden of persuading the trier of fact by a preponderance of the evidence that the employer intentionally discriminated against the plaintiff because of the plaintiff's protected status. *Id.*

To meet this burden of persuasion, the plaintiff must produce evidence showing that the proffered legitimate reason is a pretext for discrimination. *Id.* (Citing *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000)). The plaintiff may establish pretext either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or not credible. *Id.* "An explanation is false or unworthy of credence if it is not the real reason for the adverse employment action." *Id.*

B. Evidence of Pretext

The district court's grant of JMOL achieved the correct result because McFadden failed to introduce evidence sufficient to support a finding that TDCJ's proffered reasons for McFadden's termination were pre-textual, either because disparate treatment occurred or because of TDCJ's proffered explanation is false or not credible.

McFadden has offered no evidence to show that any of his supervisors at TDCJ treated him less favorably than employees of other races at any stage in the disciplinary proceedings. McFadden's arguments concerning Lyle Kastner, a white male whose position was reinstated as a result of medication, are unavailing because McFadden does not allege discrimination in the mediation process. Evidence supporting the proposition that bias may have impacted the mediation process is not probative of whether employees of different races were treated differently in initial termination for failing to call in every day. TDCJ alleges that calling in every day was an unspecified work rule, and Britt and Kinker testified that communication during an absence is regarded as important at TDCJ. While TDCJ's reasons for firing McFadden may seem arbitrary or even unfair, as the district court suggested, McFadden has not shown that these reasons were pre-textual. McFadden also points to various irregularities surrounding TDCJ' shandling of his case to show that the proffered reasons were pre-textual. None of these irregularities, however, show that the reasons were not the real reasons for his termination. The jury's finding of discrimination was therefore unsupported by the evidence, and JMOL was appropriate.

CONCLUSION

Because McFadden failed to introduce evidence to support a finding that TDCJ's proffered reasons for his termination were pre-textual, the decision of the district court granting TDCJ's motion for JMOL was appropriate. The court of appeals correctly affirmed.

The Court should deny the petition for *writ of certiorari*.

Respectfully submitted,

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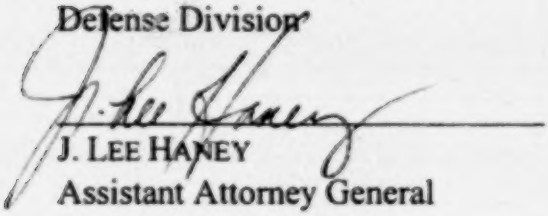

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CERTIFICATE OF SERVICE

I, J. LEE HANEY, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing **Respondent's Brief in Opposition** has been served by placing same in the United States Mail on this 17th day of October, 2005, addressed to:

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